
Reinterpreting the Role of Judiciaries in Promoting Human Rights: The Philippine Supreme Court’s Writ of Amparo and Writ of Habeas Data against Extrajudicial Killings and Enforced Disappearance

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Abstract

In 2007, the Supreme Court of the Philippines made a bold move by reinterpreting its role in adjudication by promulgating the rules of procedures for the issuance of the Writ of *Amparo* (literally meaning, “to protect”) against extrajudicial killings and enforced disappearances; and in 2008, the Writ of *Habeas Data* (literally, to “show the information”) to protect the right of informational privacy.

In this paper, I analyze the reinterpretation of the Philippine Supreme Court of its role in protecting human rights particularly in regard to the fundamental right to life, liberty and security of persons and its promulgation of rules of procedure for writs designed to protect such rights. I will first explain the impetus for this phenomenon—the persistent problems of enforced disappearances and extrajudicial killings in the Philippines. I shall discuss the investigations done by the UN Special Rapporteur, the creation of national government commissions tasked to investigate and propose recommendations, and the moves that the Supreme Court undertook. I deal with the theoretical problem of the move beyond a passive court to one that is not merely active but proactive leading towards an analytical inquiry on a type of government setup where the judiciary is proactive in human rights protection. I theorize that this is of

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political issues. I seek to pose a question for further deliberation: will the judicialization of politics lead to a of the judiciary? I in the affirmative. I shall end with a conclusion that the Supreme Court of the Philippines has advanced the role of judiciaries in human rights promotion through its power of constitutional interpretation thus furthering its political influence in national affairs. Being a major player in high politics—the Supreme Court now consideration in future institutional analyses of Philippine politics.

INTRODUCTION

The fact that international human rights law has crept all over the world is well beyond contesting. Common law judges have been recognized to have adopted international legislation especially in human rights through interpretative techniques into domestic enforcement (Waters, 2007). This trend has continued all over the world as human rights documents and norms become popularized and widely accepted (Simmons, 2009). Correlated or partly independent but also a related phenomenon is the observed increase in judicial power in the world, which has been reported, by Tate and Vallinder (1995) to be a global phenomenon, with regional observations in Europe (Sweet, 2000) and in Latin America (Angell et al., 2009). As democratization movements sweep across the globe, the judiciary as an institution of the rule of law becomes more deeply embedded. Tasked generally to assume the role of the constitutional arbiter and of the constitutional will, the courts have the power to interpret what is within their jurisdiction to decide. But jurisdiction is also a judicial issue and in the Philippines the Supreme Court has sought expansion of its role in national affairs.

The promulgation of the Rules of Procedure in regard to the Writ of *Amparo* and the Rule on the Writ of *Habeas Data* were regarded as “unprecedented” in the history of Philippine human rights governance as they were done in lieu of or prior to legislative measures as well as potentially a cautious move to seek explanation and potential retribution from the executive branch. This phenomenon has created tensions that are both countermajoritarian protective of human rights. The Supreme Court saw international human rights laws as sources of legitimate authority a minor provision in the 1987 Constitution which, until this time, was never invoked. This provision allowed the Supreme Court to justify its reinterpretation of its role under a constitutional setup and allowed itself procedural rulemaking powers to protect constitutional rights. The Supreme Court has excused itself by confining to merely procedural aspects—procedures of filing cases in courts, steps to be taken by aggrieved parties, litigation and evidence matters, and other non-“substantive” measures with the avowed intention of serving “substantive” human rights.

Human rights governance seems to connote a positive enforcement and administrative measure that would need congressional imprimatur and executive

enforcement. In the cases at bar, the judiciary stepped in to change some of the procedural rules of the game in the hopes of defending and safeguarding human rights. As with all bold moves, some setbacks may be felt and some potential problems may arise.

In this paper, I analyze the recent reinterpretation of the Philippine Supreme Court in protecting human rights particularly in regard to the fundamental right to life, liberty and security of persons its promulgation of rules of procedure for . I will first explain the impetus for this phenomenon in Part I where I describe the situation in the Philippines regarding the persistent problem of violations of the basic human rights to life. In Part II, I explain the action or reaction (depending on how one views the discourse) of the then sitting magistrates led by Chief Justice Reynato S. Puno to alleviate the perceived problem explained in Part I. In Part III, I explain the nature of the actions done by the Supreme Court and explain how this amounts to a reinterpretation of their role under a constitutional setup. In Part IV, I a *passive* court one that is not merely *active* but *proactive*Part V on type of government setup where the judiciary is on top of the other branches. I seek to pose a question for further deliberation: will the judicialization of politics lead to a poliization of the judiciary? I shall end with a onclusion that the Supreme Court of the Philippines has advanced the role of judiciaries in human rights promotion through its power of constitutional interpretation and thus furthering its political influence in national affairs. major consideration in future institutional analyses of Philippine politics.

I. THE PROBLEM OF EXTRALEGAL JUDICIAL KILLINGS

The problem of extrajudicial killings and enforced disappearances is widely recognized to have been quite rampant in the height of the Martial Law regime under former President Ferdinand Marcos in the 1970s. But two and a half after Marcos' regime was toppled by the so-called *Revolution People Power* in February 1986, the Philippines remains on the watch list of many international organizations including the United Nations (UN). Domestic organizations, especially those coming from the left of the political spectrum and those representing minority groups in the House of Representatives (e.g. *Anakpawis*, *Bayan Muna* and *Gabriela*, etc.) and international organizations have issued reports and statements detailing the problems in the Philippines. Amnesty International issued a report in August 2006 called *Philippines: Political Killings, Human Rights and the Peace Process* detailing the linkages between the problems that beset the country and spoilers of the peace processes. Official organizations and the country's national human rights institution, the Commission on Human Rights (CHR), have not been remiss and have been investigating human rights

abuses.¹ On November 2007, United Nations Human Rights Council (UNHCR) Special Rapporteur Philip Alston finalized his report covering his investigative stay in the country from 21-27 February 2007.

In his report to the UNHRC, Mr. Alston noted how the killings have eliminated civil society leaders, human rights defenders, trade unionists, land reform advocates and others who are categorized to be in the left of the political spectrum and the numbers, depending on who one talks to, ranges from 100 to 800 over a mere six-year period (2001-2007). Reported killings of journalists were also noted with an increase from 2-3 in 1986-2002, to somewhere between 7-10 from 2003 to 2006 (Alston, 2007:16).

There have been many reports but the Alston report was quite controversial because it was viewed as being done by an impartial third-party observer with the backing of the UN. Leftist and human rights groups cooperated willingly to interviews done with guaranteed or limited anonymity. Even high ranking government officials were observed to be very cooperative. This was to be contrasted from an earlier study made by the so-called “Melo Commission,” a national committee named after its chairperson, retired Supreme Court Justice Jose Melo, who was appointed by President Gloria Macapagal-Arroyo in August 2006 by virtue of Administrative Order Number 157 (2006) to address media and activists killing. She was seen to have done so as a response to international protests in response to the increasing number of extrajudicial killings in the Philippines.

However, the Melo Commission lacked popular credibility due to the boycott by invited human rights organizations and those who were from the left of the political spectrum. They apparently refused on grounds that the Melo Commission was neither independent nor impartial. Many also feared that by testifying before the Commission they might be placed in mortal danger. Despite this, the Melo Commission completed its initial report in December 2006. Another complication for the Melo Commission was the apparent withholding of the findings by the Government. The Philippine Government made a limited release to international observers through European Union officers and some other diplomatic officers and considered not releasing the document to the public. This enraged many national observers. Subsequently though, the Melo Commission’s Report was released to the public at about the same time Mr. Alston was conducting his interviews and independent research (Dalangin-Fernandez, 2007).

¹ N.B. The Commission on Human Rights (CHR) is not empowered to prosecute or bring the cases before judicial bodies. The most the CHR is empowered to do is to investigate. In this sense the CHR is a fact-finding institution. However, the prosecutor’s offices are supposed to be able to act *motu proprio* on cases that assail human rights to life, as they may qualify into one of the existing criminal typologies on crimes against persons. The Philippine NHRI remains institutionally weak in this regard. Comparatively, however, the Philippine CHR is relatively strong as it is institutionalized.

The Alston Report studied the context of killings in the Philippines and identified many potential causes as well as prevailing problems in the justice system. It is a well intentioned and rigorous case study available for online readers to peruse and dissect to have a greater understanding of the extrajudicial killings in the Philippines. According to President Arroyo the government allowed Mr. Alston to do his work “unimpeded and to render his report in full glare of the media,” to prove “beyond doubt that the Philippine Government upholds democracy, human rights, and press freedom,” and thanked “Mr. Alston for acknowledging that the cooperation of the Government in his probe, and that [the Government officials] are taking the right steps to right the situation.” (Dalangin-Fernandez, 2007).

Before Mr. Alston arrived in the Philippines, the Supreme Court already made steps with the designation of certain courts to be “political killings court.” This was partly in response to the creation of an Inter Agency Legal Action Group (IALAG) by President Arroyo in 2006 to coordinate the actions of the military and the policeto lessen the dismissal of cases where the suspected individuals were released for failure to comply with the rules of criminal procedure as well as for the rules on warrantless arrests. This move of the Executive was obviously one sided. The establishment of the political killings courts was to balance this. On March 1, 2007, Chief Justice Reynato S. Puno, responding to petitions and requests from diverse civil society and press groups, issued Administrative Order. No. 25 -2007 designating 99 special courts to try and decide cases involving killings of political activists and members of the media.

The Alston Report noted this move by the Judiciary and was optimistic about it. But the Supreme Court, under the administration of then Chief Justice Reynato S. Puno remained unsatisfied with such a role of being mere “passive receptacles of justice” (Puno 2007) who waited on the justice department to bring a case before it—it engaged in a conspiracy, a self-proclaimed “conspiracy of hope” (Puno 2007).

II. CONSPIRING FOR HOPE

On July 16-17, 2007, in an unprecedented move, the Supreme Court called for a “conspiracy of hope” through a conference entitled *National Consultative Summit on Extrajudicial Killings and Enforced Disappearances—Searching for Solutions* (“Summit”). The Summit brought together various stakeholders in the issue in a clinical and dispassionate, two-day workshop, with Justices of the Supreme Court each handling one of the 15 working groups with memberships ranging from military officials, media journalists, civil society representatives, members of the Senate and the House of Representatives, members of the Justice department, other cabinet officials, various members of leftist organizations, and even the Chief of Staff of the Armed Forces of the Philippines. Chief Justice Reynato S. Puno noted that the success of the Summit

depended on the cooperation of the stakeholders of the justice system (Puno 2010). This was more than a legitimating factor—the consultation processes having been supervised by the most judicious of the governmental branch—gave a weight of impartiality on the discussion of the disputes. Unparalleled in its impact, it brought together members from the rightmost to the leftmost together in a clinical and dispassionate setting before Supreme Court justices to try and work some of the issues out. This was not a move by the active Executive nor by the Legislative branch of the government. The formerly passive branch of the government did this. This was pushing the buck of judicial activism.

Chief Justice Puno was conscious of potential criticism for over-judicializing, in his persuasive speech before the gathered attendees, he eloquently said:

“I have been asked the reason for blowing the trumpet call for this Summit on Extrajudicial Killings and Forced Disappearances. In the beginning, the question did not bother me and with the patience of Job, I tried my level best to explain its rationale. It seems, however, that the question has a long life and it kept on hounding me whenever I meet people. It dawned on me that the persistence of the question has its salience for it shows at the very least the surprise with which people greet the Summit. If you scratch the surface further, you will discover that a large slice of our people appear to have their concern over these killings and disappearances already interred by time. Their sense of shock has been anesthetized by the escalation of the killings and disappearances despite the size of the space given to them by the print media. *If there are compelling reasons for this Summit, one of them is to prevent losing eye contact with these killings and disappearances, revive our righteous indignation, and spur our united search for the elusive solution to this pestering problem.* At this moment, we may not know how to solve this problem, but we do know that the sure way to lose its solution is to be immobilized by doubt, to be terrorized by the thought that any effort to lick the problem will no more than amount as an effort to square the circle. This Summit is envisioned to thus provide a broad lens, synoptic perspective on our problem of extrajudicial killings and forced disappearances. We have summoned the most authoritative scholars representing the rainbow of interests of the different stakeholders of the justice system, including international experts, all of whom, we hope, can lead us in this journey, for certainly we do not expect this journey to be an easy one, a no brain, follow the dot journey. By calling this Summit, we are affirming our belief in human rights not only in the abstract; we are affirming that

before the universal altar of human rights there can be no atheism, nor agnosticism on our part.” (Puno 2007, emphasis supplied.)

Two noteworthy things here, in the Chief Justice’s Keynote Speech: first, is that he invokes a democratic framework of consensus building, and second, he sees a role for the Supreme Court to take part in. This was pragmatic thinking and highly consequentialist. In this Keynote Speech, the Chief Justice also invoked an expanded construction of the powers of the Supreme Court under the 1987 Constitution. The Chief Justice opined that,

“The 1987 Constitution is the most pro human rights of our fundamental laws. It ought to be for it was a robust, reactive document to the trivialization of human rights during the authoritarian years, 1972 to 1986. Indeed, it was written by those whose common thread is their bountiful bias in favor of human rights. This pre-eminent prejudice in favor of human rights induced our constitutional commissioners to reexamine the balance of power among the three great branches of government—the executive, the legislature, and the judiciary. The *reexamination* easily revealed that under the then existing balance of power, the Executive, thru the adept deployment of the commander-in-chief powers, can run roughshod over our human rights. It further revealed that a supine legislature can betray the human rights of the people by defaulting to enact appropriate laws, for there is nothing you can do when Congress exercises its power to be powerless. It is for this reason and more, that our Constitutional Commissioners, deemed it wise to strengthen the powers of the Judiciary, to give it more muscular strength in dealing with the non-use, misuse, and abuse of authority in government. Let me just cite two of these new prominent powers given to the Judiciary. First, the judicial power was expanded to include the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government” (Puno 2007).

The Chief Justice went on to cite his argument on why the countermajoritarian institution should have the authority to perform this protectionist act.

“After World War II, countries that embraced liberal democracies as their political ideology have given their judiciaries the explicit authority to protect the human rights of their citizens. Indeed, this is

congruent to the global expansion of judicial power, which has been observed as one of the most significant trends in late 20th and early 21st century governments. Some legal eagles call this as the ‘judicialization of politics.’ This new role given to courts both in developed and developing democracies is not difficult to understand. Heretofore, the protection of human rights has been entrusted to the political branches of government or to our electorally accountable officials and not to politically independent judiciaries. *Over the years, however, the expectation that human rights could best be protected by the political branches of government has been diluted. There is a catalogue of causes for this failed expectation, but let me just cite the main ones. Elected officials usually go for what is popular but the vindication of human rights sometimes demand taking unpopular decisions especially in instances, where due to technicalities, the right of the righteous is trumped by the rights of the wicked. Likewise, elected officials sometimes demur in making decisions that will displease their powerful constituencies. Such a tilted stance cannot be taken by protectors of human rights who must at all times maintain an even keel on the rights of the opposites. The Constitution is not only the refuge of the worthy but also the worthless, it is not only the fortress of the strong but also the weak.*” (emphasis supplied)

It seems that the Chief Justice has raised a potent argument against Alexander Bickel’s critique of the Supreme Court as being better off as a passive institution because of its non-democratic nature (Bickel 1962). There is a need to protect the minority from the majority. Minority rights are not served best by the political branches because they are beholden to popular interests.

Perhaps this move by the Puno Court would fall more closely with Neal Kumar Katyal’s concept of “advicegiving,” which occurs “when judges recommend but do not mandate, a particular course of action based on a rule or principal in a judicial case or controversy” (Katyal 1998:55). But the end product was not just an advice on how to go about doing things.

The end product blossomed into a new set of rules that could and were designed to change the game. After collating all the observations, discussions and recommendations, as well as forwarding all the relevant materials to the branches of government involved²— the Supreme Court tasked its Rules Committee to find ways and means of being able to tackle the issue head on.

² The Supreme Court keeps an online archive of all the proceedings and recommendations collected in the said Summit in its official website at <http://sc.judiciary.gov.ph/publications/summit/index.php> (last accessed December 12, 2011).

III. THE WRITS OF *AMPARO* AND *HABEAS DATA*

Due to space constraints, I cannot detail the outline of the rules as well as their nuances. They are easily available online and together with a fellow law clerk, I have previously detailed the ongoings and the deliberations of the Supreme Court Rules Committee elsewhere (Gozon & Orosa 2008).

The writ of *amparo* is a judicial writ that compels a person or government agent to do or not do an act that is related to the protection of the life, liberty and security of a person. For example, it may be used against a military official charged for abduction of an alleged state criminal who pleads political persecution. Before the writ of *amparo*, the writ of *habeas corpus* was the only judicial remedy—however, the writ of *habeas corpus* can be easily denied and defended against—a general denial of knowledge of the person’s incarceration would suffice. The courts can compel the government agency, upon hearing, to cease and desist from their actions that threaten the right to life, liberty and security of the person so involved. The writ of *habeas data* functions like the writ of *habeas corpus* but instead of the actual body of the person sought, the “corpus” here is “data.” The writ of *habeas data* seeks to protect the right of an individual to informational privacy.

Suffice it to say that, the writs of *amparo* and *habeas data* are prerogative writs much like the writ of *habeas corpus*. They complement each other and reinforce existing remedies. In *habeas corpus* a simple denial would suffice to have the case dismissed. This cannot be done with the writ of *amparo*. The writ of *amparo* extends the diligence requirement higher and at the same time provides several provisional remedies to secure the liberty of a person. The writ of *amparo* is designed to protect the life, liberty and security of persons while the latter is designed to protect the right to privacy over the home, person, family and correspondence of persons under threats of extrajudicial killings and enforced disappearances. These may be filed before the Regional Trial Courts, the Court of Appeals or even with the Supreme Court (but since the Supreme Court cannot try facts, it may issue a writ, but the trial would have to be conducted or remanded to the Court of Appeals as it has been done previously).

Salient portions of the deliberations by the Rules Committee refer to invocation of international human rights law in defining extrajudicial killings and enforced disappearances. International human rights laws were also instrumental in the definition of rights applicable in the case of extrajudicial killings and enforced disappearances. For example, in Section 1 of the Rule on the Writ of *Amparo*, the coverage or protection was defined to include “life, liberty and security of persons” invoking the provisions of the Universal Declaration of Human Rights and the relevant provisions of the International Covenant on Civil and Political Rights. Will the Supreme Court be able to protect human rights by expanding its scope of authority? In this case, it seems the

Court has. If we were to the cases that were brought before the courts after the promulgation of the rules, one would notice that civilians did not hesitate to bring their suits before the courts. History, of course, would be a better empirical reply. But at the outset, it can be observed that there is an added recourse for individuals in the Philippines against persecution especially for threats against their lives.

IV. JUDICIALIZING HUMAN RIGHTS PROTECTION

Courts have always had great participation in the vindication of human rights as well as its violation. It was the Supreme Court of the United States that legitimized ownership of slaves a century ago and it was also the same court that vindicated the equal rights of to access education and discrimination in *Brown v. Board of Education* (1954). What lessons could be learned from the judicialization of politics in the area of human rights in view of the new writs?

Let us see some of the cases that the Supreme Court has decided.

In *Defense Secretary vs. Manalo* (2008), Raymond and Reynaldo Manalo, were abducted by military men belonging to the Citizen's Armed Forces Group (CAFGU) on the suspicion that they were members and supporters of the communist insurgency movement. After 18 months of detention and torture, the brothers escaped. Ten days after their escape, they filed a *Petition for Prohibition, Injunction, and Temporary Restraining Order* to stop the military officers and agents from depriving them of their right to liberty and other basic rights. Pending the said case, the Rule on the Writ of Amparo took effect on October 24, 2007. The Manalos subsequently filed a manifestation and omnibus motion to treat their existing petition as an amparo petition.

On December 26, 2007, the Court of Appeals granted the privilege of the writ of amparo. The appellate court ordered the Secretary of National Defense and the Chief of Staff of the Armed Forces to furnish the Manalos and the court with all official and unofficial investigation reports as to the Manalos' custody, confirm the present places of official assignment of two military officials involved, and produce all medical reports and records of the Manalo brothers while under military custody. The Secretary of National Defense and the Chief of Staff of the AFP appealed to the Supreme Court seeking to reverse and set aside the decision promulgated by the Court of Appeals.

The Supreme Court denied the petition and ruled that there is a continuing violation of the Manalos' right to security. It held that: "The Writ of Amparo is the most potent remedy available to any person whose right to life, liberty, and security has been violated or is threatened with violation by an unlawful act or omission by public officials or employees and by private individuals or entities" The court construed the

amparo protection to include liberty against apparent threats. Understandably, since their escape, the Manalos have been under concealment and protection by private citizens because of the threat to their life, liberty, and security. The Court noted that “The circumstances of respondents’ abduction, detention, torture and escape reasonably support a conclusion that there is an apparent threat that they will again be abducted, tortured, and this time, even executed. These constitute threats to their liberty, security, and life, actionable through a petition for a writ of amparo” (*Defense Secretary vs. Manalo*, 2008).

In the case of *General Avelino Razon vs. Tagitis* (2009), involving the chief of the national police and an engineer-consultant for the World Bank who disappeared under dubious circumstances while doing his field research, the Supreme Court had the occasion to explain further the nature of the writ of amparo. Mr. Justice Brion, speaking for the court explained that:

“This Decision reflects the nature of the Writ of *Amparo* – a protective remedy against violations or threats of violation against the rights to life, liberty and security. *It embodies, as a remedy, the court’s directive to police agencies to undertake specified courses of action to address the disappearance of an individual, in this case, Engr. Morced N. Tagitis.*

It does not determine guilt nor pinpoint criminal culpability for the disappearance; rather, it determines **responsibility**, or at least **accountability**, for the enforced disappearance for purposes of imposing the appropriate remedies to address the disappearance. **Responsibility** refers to the extent the actors have been established by substantial evidence to have participated in whatever way, by action or omission, in an enforced disappearance, as a measure of the remedies this Court shall craft, among them, the directive to file the appropriate criminal and civil cases against the responsible parties in the proper courts. **Accountability**, on the other hand, refers to the measure of remedies that should be addressed to those who exhibited involvement in the enforced disappearance without bringing the level of their complicity to the level of responsibility defined above; or who are imputed with knowledge relating to the enforced disappearance and who carry the burden of disclosure; or those who carry, but have failed to discharge, the burden of extraordinary diligence in the investigation of the enforced disappearance. In all these cases, the issuance of the Writ of *Amparo* is justified by our primary goal of addressing the disappearance, so that the life of the victim is preserved and his liberty and security are restored.

We highlight this nature of a Writ of *Amparo* case at the outset to stress that the unique situations that call for the issuance of the writ, as well as the considerations and measures necessary to address these situations, may not at all be the same as the standard measures and procedures in ordinary court actions and proceedings. In this sense, the Rule on the Writ of *Amparo* (*Amparo Rule*) issued by this Court is unique. The *Amparo Rule* should be read, too, as a work in progress, as its directions and finer points remain to evolve through time and jurisprudence and through the substantive laws that Congress may promulgate.” (*Razon vs. Tagitis*, 2009)

The Supreme Court has also dismissed a case where the writ of amparo was sought after to protect private property rights (*Tapuz vs. del Rosario*, 2008). The Court made it clear that it was designed to protect a specific kind of rights and not one that exceeds such scope.

Court Administrator Jose Midas P. Marquez reported the many successes of the writ of amparo both in the appellate as well as grassroots level (Marquez, 2008). Marquez noted how in many cases, trade unionists or student activists as well as minority group leaders have used the petition to seek a protection order against threats as well as a *production* order to seek the production of certain people under the custody of government officials without judicial cause as well as appoint a temporary shelter for the aggrieved person while the petition is ongoing. The Court differentiated this *production order* under the Rule on the Writ of Amparo from a search warrant for law enforcement. (*Defense Secretary v. Manalo*, 2008)

An eminent jurist and legal professor in the Philippines, retired Justice Vicente V. Mendoza opines that the writ of amparo is merely an “auxiliary writ” which is attached to the writ of habeas corpus and thus, suspended together with the privilege of the habeas corpus given certain events like a martial law declaration (Mendoza 2008). Justice Mendoza noted that “the Rule on the Writ of Amparo is significant for its affirmation of the power of courts to adopt needful measures for carrying out their habeas jurisdiction or in hearing civil or criminal prosecutions for violations of rights of personal security. The reliefs that may be availed of may not amount to much, but in the fight against the menace to personal freedom and security, anything is better than nothing.” (Mendoza 2008:6). Another eminent legal Constitutional Law professor in the Philippines, Prof. Pacifico A. Agabin of the University of the Philippines College of Law notes that the move by the Puno Court broke free from the of the American model that put priority in the negative liberties and rendered positive liberties hardly worth judicializing (Agabin 2010:87).

Albeit smaller in scope, the promulgation of the writs also forced the Philippine Supreme Court to check other jurisdictions for legal frameworks and be more familiar with comparative remedial and procedural laws. The writs of *amparo* and *habeas data* have their origin in Latin American countries.

It is also noteworthy how the language of the writ follows the language of UN documents and international human rights treaties and even some provisions of the Istanbul Protocol on torture on the standards required of government officials and officers in evidentiary matters in relation to their diligence requirement. Under the rules on the writ of *amparo* and *habeas data*, positive obligations are imposed on the officers and the privilege of a simple denial is removed.

V. JUDICIALIZATION TO JURISTOCRACY

So where is this all headed?

Being the sole interpreter of the roles of the governmental bodies under a constitutional setup, does this amount to judicial rule over the other bodies? The short answer is “no.” In its invocation of the constitutional power to promulgate rules that govern litigation of constitutional and human rights, the Supreme Court justifies its power. It avoids “substantive” legislation. What it creates are mere procedural rules designed to govern litigation and court processes and does not affect substantive rights that may be shifted by Congress. However, we should not forget the invocation of the Chief Justice or the role of the Supreme Court in determining grave abuse of discretion amounting to lack or excess of jurisdiction of other branches or agencies of the government. This is a unique textual power granted by the 1987 Constitution under Article VIII, Section 1. This crystallizes the usually oscillating nature of judicial power in judicial review. Not only can courts create rules to protect and promote human rights, it can also review acts of the other branches of the government given a certain set of circumstances and real parties in interest.

This is a unique aspect of the Philippine Constitution. It is the Constitution itself that expanded the certiorari powers of the Supreme Court. Coupled with a litigious society, and a lack of legitimacy on the part of the other branches, Hirschl’s (2004) theory of juristocracy as happening with new constitutional meaning making may be validated in what Pangalangan observes in the Philippines as a “Government by Judiciary” (Pangalangan 2009).

Can Congress overturn the writ of *amparo* and *habeas data* rules, them being mere procedural remedies? It is actually the hope of the members of the Rules Committee that a similar, more potent law, be crafted by Congress—and they expressly noted that the legislative branch may create laws protecting human rights and that the

Supreme Court shall augment this with rules of procedures (Gozon & Orosa, 2008: 12-13). However, it must be noted that Congress has seen fit to legitimize the writ of amparo and habeas data when it promulgated Republic Act No. 9745 or the Anti-Torture Act of 2009 where in Section 10 of the law it provided for its legal against torture and the same law mandating the expeditious settlement of amparo and habeas data cases involving torture. This augments and partly repeals certain provisions of Republic Act No. 9372 or the Human Security Act (not to be confused with the IR term, this is the Anti-Terrorism law of the Philippines which created the Anti-Terrorism Council and provided for the rights and responsibilities of government officials in relation to terrorist issues) in February 19, 2007.

By virtue of Republic Act No. 9745, albeit indirectly, *Amparo* and *Habeas Data* remedies are now no longer mere judicial creatures but are congressionally recognized as well.

When the Rule on the Writ of *Amparo* was promulgated and about to take effect, the Executive Government through the Solicitor General's Office petitioned modifications to the Rule (in particular, the changing of 2 days reply period to 5 days) to give some elbow room for the Solicitor General's Office to make consultations and render due service to the military or other governmental body charged with responsibility and is asked to . The petition was granted and the Rule on the Writ of *Amparo* was modified.

By promulgating rules that govern the issuances of nuance writs, the Supreme Court of the Philippines has taken a proactive stance in the holistic promotion of human rights in their generational forms. This is beyond the traditional notion of judicialization for this did not just involve the redefinition of existing legal standards but contained administrative and enforcement mechanisms for the protection of human rights. By playing in the field of what is traditionally parliamentary, the Court has become a major player in the concretization of norms in the country. As with many kind of swords, they cut both ways. The so-called unsheathing of this constitutional power to enact rules to safeguard human rights may cut the court by furthered risks to judicialization. It must be noted that judicialization of politics may lead to the politicization of the judiciary. The different branches of government may see it well within their interests to place like-minded persons in the judicial seat as well as to look for other avenues of control, such as the use of the power of the purse against the Court by limiting its budget or in the appropriations and budget disbursements through the Executive arm.

Also, a politicized judiciary may soon become threatening to human rights as a fundamentalist government. After all, it was a politicized judiciary that legitimized Martial Law in *Javellana v. Executive Secretary* (1973) and the participative right of the masses in constitutional change in *Lambino v. Commission of Elections* (2007).

The political philosopher Alexander de Tocqueville once wrote that “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question.” In the Philippines, it is contested that there is almost no issue beyond judicial intervention (Pangalangan 2009). From economic issues to politically charged situations like the removal and impeachment of Presidents, the Philippine Supreme Court has been on top of things leading Prof. Raul Pangalangan, a much respected legal scholar, to write about a “Government by Judiciary” highlighting the problems that a judiciary like the Philippines faces where it allows judicial activism to becoming a threat to democracy.

American legal scholars note that a Bickelian weak form of the judiciary may actually serve democracy more. Jeffrey Goldsworthy (2003:484) opines that this weak form of judicial review “offers the possibility of a compromise that combines the best features of both the traditional models, by conferring on courts constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word.” Professor Mark Tushnet agrees with this proposition and further noted that this weak-form model will have the capacity to balance legislative intentions and actions with judicial safeguards to create a more democratic way of legislative-interpretive appreciation and promotion of human rights, particularly in terms of socio-economic rights (Tushnet 2003a; 2003b; 2004a; 2004b and 2001).

The Supreme Court seems to be aware of this but sets it aside for the greater pursuit of protecting primordial rights. It seems that this has been a countermajoritarian move by the Court and it has been mindful and yet unhampered in furthering its role in the politics by entrenching its role in issues even of political import. These *amparo* and *habeas data* cases seemingly weakened the political question doctrine and expanded the notion of judicial review especially in these cases where the procedural methods are all judicial in origin.

What are possible from which a regional human rights mechanism could benefit from in this regard?

Regions which place great premium for human rights may see some procedural benefits to these writs. However, regions which may yet be designing their human rights mechanism may see some nuances that may be useful for their design. Protection orders and other new initiatives give some elbow room for the adjudicating body to ask the parties to explain their side. Universality of standards is a different issue. In internationalization of human rights, there could be dependence on meaning making where there is an asymmetrical flow of information and definition making but where there is a symmetrical or even multilateral definition making, then interdependence can be mutually reinforced.

CONCLUSION

Human rights issues because of their inherent nature of being claims of state duties and responsibilities towards individuals tend to be issues of high politics. High political areas tend to have great stakes in their gameplay. With the entrance of the judiciary into the picture, certain rights judicially defined become high priority values—their protection become subject to judicial remedies. This process leads towards partial judicialization of politics. Judicialization of politics may open the doors for the politicization of the judiciary. In a political game, players would seek to maximize their interest by getting the arbiter to their side. Judges have an imperceptible source of legitimacy—their impartiality and apparent silence in the political arena. This is the notion of the least dangerous branch of government that Alexander Bickel once defined as the epitome of proper non-intervention.

The Philippine Judiciary may no longer be a Bickelian court. By seeking to expand its area of responsibility in the protection of human rights, it has expanded its powers. The Court has the power to interpret law. But the law is not a panacea for solutions. Law is a byproduct of politics. If there is a lesson that the Philippine experience can show—is that judicialization can actually be a force towards implementation. But we must be mindful of limitations. Writing rights does not necessarily right rights. Procedural matters contribute a great deal of import. But codification and legalization is not the only way. It is effective to some extent but it must be cautiously integrated with holistic efforts including judicial intervention. In the case of the Philippines, we may have seen a Supreme Court that has taken judicial activism to a potential limit. True, there are many other institutions such as the National Human Rights Institutions or NHRIs which can pursue human rights protection and promotion—but where they have been silenced or rendered powerless, the court of last resort seemingly can do something about it—but as a last resort. The Supreme Court of the Philippines did something and it was a last ditch effort. But for the protection of the liberal notion of human rights, perhaps what is needed is consequential and pragmatic thinking. Sometimes, to protect that which is fundamental, something usually radical may be needed. That is what the Supreme Court saw and in this case—acted upon it.

The Philippine Supreme Court reinterpreted its role. This may prove to be beneficial in the short term—this may have had been completely necessary to protect human rights at that exact moment. Had the Supreme Court not stepped in, there may not have had been desistance on the part of the military on their all-out war against perceived government organizations and individuals without due regard to the due processes of law—something that the Supreme Court itself breathes for its existence. The long term though, will be charged with uncertainty leaning towards the further political role of the Supreme Court. Now that the populace has been increasingly

informed of another political player in the society, many will seek to maximize their interest through this institution's perceived power and authority.

REFERENCES

Laws, Official Rules and Orders

- [1] 1987 Constitution of the Republic of the Philippines
 - 1987 Const. Art. VIII, § 5(5) (to enforce constitutional rights).
 - a. Supreme Court
- [2] A.M. No. 07-9-12-SC, The Rule on the Writ of *Amparo* available online at http://sc.judiciary.gov.ph/RULE_AMPARO.pdf (last accessed March 5, 2011).
- [3] A.M. No. 08-1-16-SC, The Rule on the Writ of *Habeas Data*, promulgated January 22, 2008, effective February 2, 2008; available online at <http://sc.judiciary.gov.ph/rulesofcourt/2008/jan/A.M.No.08-1-16-SC.pdf> (last accessed March 5, 2011).
 - b. Office of the President
- [4] Administrative Order No. 157, 'Creating an Independent Commission to Address Media and Activist Killings' (2006).
 - c. Congress of the Philippines
- [5] Republic Act No. 9372 (2007). 'An Act to Secure the State and Protect Our People from Terrorism' (Section 1 of the Law says it shall be known as "The Human Security Act of 2007.")

Supreme Court Decisions

- a. Philippines
- [6] *Javellana v. Executive Secretary*, G.R. No. L-36142, 151-A Philippine Reports 35 (Mar. 31, 1973).
 - [7] *Lambino v. Commission on Elections*, G.R. No. 174153, 505 Supreme Court Reports Annotated 160 (Oct. 25, 2006).
 - [8] *Gen. Avelino I. Razon, Jr., Chief, Philippine National Police (PNP) etc., vs. Mary Jean B. Tagitis*, G.R. No. 182498, December 3, 2009 (EN BANC, per Brion, J.).
 - [9] *Secretary of National Defense, the Chief of Staff, Armed Forces of the Philippines vs. Raymond Manalo and Reynaldo Manalo*, G.R. No. 180906, October 7, 2008 (EN BANC per Puno, C.J.).
 - [10] *Daniel Masangkay Tapuz vs. Hon. Judge Elmo del Rosario, et al.*, G.R. No. 182484 (EN BANC, per Brion, J.).

b. United States

- [11] Brown vs. Board of Education of Topeka, 347 U.S. 483 (1954).

Books and Journal Articles

- [12] Agabin, Pacifico A. (2010). 'Chief Justice Puno and the Positive Concept of Liberty,' In *Puno Justice* (Jose Midas P. Marquez, ed.). UNDP, Manila.
- [13] Angell, Alan; Line Schjolden & Rachel Sieder. (2009), *The Judicialization of Politics in Latin America*. Palgrave MacMillan.
- [14] Bickel, Alexander. (1962): *The Least Dangerous Branch*. Indianapolis, IN: Bobbs-Merrill.
- [15] de Tocqueville, Alexander. (1992): *Democracy in America*, p. 257 (Harvey C. Mansfield & Delba Winthrop trans. and eds., 1992).
- [16] Goldsworthy, Jeffrey. (2003). 'Homogenizing Constitutions,' In *Oxford Journal of Legal Studies*, Vol. 23, p. 484.
- [17] Gozon, Felipe Enrique M., Jr. and Theoben Jerdan C. Orosa. (2008). 'Watching the Watchers: A Look into the Drafting of the Writ of Amparo.' In *Philippine Law Journal*, Vol. 82, pp. 8-28. Also available online at <http://journals.upd.edu.ph/index.php/law/article/viewFile/1876/1792>
- [18] (last accessed March 30, 2011).
- [19] Hirschl, Ran. (2004): *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Harvard University Press.
- [20] Katyal, Neal Kumar. (1998): 'Judges as Advice Givers.' In *Stanford Law Review*, Vol. 50 p. 1709.
- [21] Mendoza, Vicente V. (2008): 'A Note on the Writ of Amparo.' In *Philippine Law Journal*, Vol. 82, pp. 1-7.
- [22] Pangalangan, Raul C., (2009): 'Government by Judiciary in the Philippines: Ideological and Doctrinal Framework.' In *Administrative Law and Governance in Asia: Comparative Perspectives* (Tom Ginsburg and Albert H.Y. Chen, eds.). Routledge.
- [23] Puno, Reynato S. (2010): *From Complacency to Contemplation to Commitment to Action—A Collection of Speeches*, Supreme Court Printing Service, Manila.
- [24] Simmons, Beth A. (2009): *Mobilizing for Human Rights: International Law in Domestic Politics*.

- [25] Supreme Court of the Philippines Public Information Office. (2007). *A Conspiracy of Hope: A Report on the National Consultative Summit on Extrajudicial Killings*. Philippine Supreme Court Public Information Office, Manila.
- [26] Sweet, Alec Stone. (2000): *Governing with Judges: Constitutional Politics in Europe*. Oxford University Press.
- [27] Tate, C. Neal; & Torbjörn Vallinder. (1995): *The Global Expansion of Judicial Power*. New York University Press.
- [28] Tushnet, Mark. (2001).: ‘Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies.’ In *Duke Law Journal* Vol. 50, p. 1395.
- [29] _____. (2003a).: ‘Alternative Forms of Judicial Review.’ In *Michigan Law Review*, August 2003, vol. 101, No. 8.
- [30] _____. (2003b). ‘New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries.’ In *Wake Forest Law Review*, Vol. 38, p. 813.
- [31] _____. (2004a): Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action 36 *Connecticut Law Review* 649 (2004);
- [32] _____. (2004b): Social Welfare Rights and the Forms of Judicial Review. In *Texas Law Review* Vol. 82, p. 1895.
- [33] Waters, Melissa A. (2007): ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties.’ In *Columbia Law Review* Vol. 107, p. 628.

Speeches

- [34] Marquez, Jose Midas P., (2008). *The Writ of Amparo and Habeas Data: Seven Months After*, Speech before the National Union of Public Lawyers, August 19, 2008 available online at <http://nupl.net/home/?p=121> (last accessed March 30, 2011).
- [35] Puno, Chief Justice Reynato S.. (2007): *View from the Mountaintop*, Keynote Speech, National Consultative Summit on Extrajudicial Killings and Enforced Disappearances: Searching for Solutions, Manila Hotel, Philippines, July 17, 2007 available online at <http://sc.judiciary.gov.ph/publications/summit/EJK%20Summit%20CJRSP%20Keynote%20Speech.pdf> (last accessed March 30, 2011).

Newspapers and Periodic Sources

- [36] Dalangin-Fernandez, Lira. (2007): ‘Palace releases Melo report.’ In *The Philippine Daily Inquirer*. February 22, 2007; available online at http://newsinfo.inquirer.net/breakingnews/nation/view/20070222-50940/Palace_releases_Melo_report
- [37] Pangalangan, Raul. Passion for a Reason, ‘Judicial Activism and its limits’, In *Philippine Daily Inquirer*, February 1, 2008.